IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(MOROGORO SUB-REGISTRY)

AT MOROGORO

LAND APPEAL NO. 04 0F 2023

(Arising from Land Application No. 146 of 2020; In the District Land and Housing Tribunal for Morogoro, at Morogoro)

FLORA IDD .....APPELLANT

VERSUS

HADIJA HAMIS KISOZI ..... RESPONDENT

JUDGMENT

29th Sept, 2023 & 26th Febr, 2024

M.J. Chaba, J.

This is a first appeal. It stems from the decision of the District Land and Housing Tribunal for Morogoro, at Morogoro (the trial Tribunal) in Land Application No. 146 of 2020 whose judgment was rendered on the 2nd December, 2022. According to the records, the estimated value of the disputed land was TZS. 10,000,000/= (Say Ten Million Only). In that case, the respondent, HADIJA HAMIS KISOZI instituted a land case against the appellant, FLORA IDD seeking several orders of the trial Tribunal as follows: One; A declaration that she is a lawful owner of the said premises, Two; A declaration that the appellant, FLORA IDD is a trespasser into the respondent's suit land, Three; The trial Tribunal to order the appellant to demolish her building and vacate from the land in dispute, Four; Appellant to pay general damages to her to the tune of TZS. 20,000,000/=, Five;

Costs of the suit be borne by the appellant; and Six; Any other orders that the trial Tribunal could considers fair, reasonable and just to grant.

At the height of trial, the suit was decided in favour of the respondent, HADIJA HAMIS KISOZI and she was declared as the legal owner of the un-surveyed parcel of land located at Changarawe area, Mzumbe Ward within Mvomero District in Morogoro Region, measuring 86 x 55 on one side and 18 x 35 on the side, bordered by the following neighbours: West - Paulina Shabani, East - Mwenda Mwenda Mdeng'o, North - Mlali/Mgeta Road, and South - Martin Mtindo. More-over, the trial Tribunal expressly declared the appellant, FLORA IDD a trespasser on the suit land and she was ordered to make vacant possession and demolish her building constructed on the same. She was further condemned to pay costs of the suit and general damages to the tune of TZS. 1,000,000/= (Say, One Million Tanzanian Shillings Only).

However, the appellant was dissatisfied by the decision of the trial Tribunal and therefore, on 16th January, 2023 she preferred an appeal to this Court by lodging a memorandum of appeal containing six grounds of appeal, which later on, the Counsel for the appellant sought leave and was granted to amend the same. The amended memorandum of appeal was filed in this Court on 30th May, 2023 and duly served upon the respondent who in turn filed reply to the memorandum of appeal on 13th February, 2023.

For the better appreciation of the matter before this Court and for the sake of narrowing and making the issues involved in this case so clear, I find it apt to firstly give a brief factual background of the matter which culminated to this instant appeal. As gleaned from the Court records, way back on 14th October, 1969 the

respondent / applicant purchased one acre of parcel of land from Mr. Kaloli Kinanga for consideration of TZS. 4/= (Say, Four Tanzanian Shillings Only). The sale transaction between the respondent herein and Mr. Kaloli Kinanga was reduced into writing (Sale Agreement) and their Agreement / Contract was witnessed by Mr. Salum Misale and Kibwana Mvomera. By then, the place was called Mongora Village, currently known as Changarawe Ward. The respondent told the trial Tribunal that, sometimes later, she offered a portion of her parcel of land to Pauline Shabani and from there, she remained in peaceful occupation of the disputed land and uninterrupted for quite numbers of years. It was the respondent's testimony at trial that, her parcel of land is bordered by Ms. Mdemu, Nyoni Misukosuko, Martine Mtindo and Old Zambia Road now Mlali-Mgetta Road.

That, sometimes in 2012 she faced health problems and she was obliged to travel to Muhimbili National Hospital in Dar Es Salaam Region for medication, whereby she remained in the city for some years. She said, she left her parcel of land under supervision and care of her brother one RASHID HAMIS KISOZI. While in Dar Es Salaam, she was informed that the appellant has trespassed onto her parcel of land and constructed thereon a permanent building. She asserted that, upon reached in Morogoro, she was informed that the appellant trespassed onto the suit land in 2015/2016 and in the same year built a house thereon. She said, though she approached the appellant in an amicable way so as to resolve the dispute, her efforts proved futile. Thereafter, she tried to table her complaint against the appellant before the leaders within her locality but again the appellant was not ready to cooperate, hence refused to show up. Due the surrounding circumstance, the respondent had no other option to redeem her suit land other than knocking the

door of the trial Tribunal seeking for her rights. In her evidence at the Tribunal, the respondent stated that, the land in dispute involves a parcel of land measuring thirty (30) lengths paces and thirteen (13) width paces.

To her part, the appellant's story was straight. She fended herself by telling the trial Tribunal that, on 6th October, 2009 her husband, the Late SHADRACK SAMWEL NKWABI and herself, jointly bought un-surveyed parcel of land from ASHA HAMIS KISOZI measuring forty (40) lengths feet and twenty (20) width feet. She said, within the said parcel of land, there was a house / building which was built by the said ASHA HAMIS KISOZI. She also claimed that, they purchased the disputed parcel of land for TZS. 3,000,000/= (Say, Three Million Tanzanian Shillings Only) and the sale transaction or sale agreement was reduced into writing. She said, they jointly improved and developed the land in dispute and stayed peacefully with her husband until on 31st August, 2018, when her lovely husband passed away. She averred that, following the demise of her husband, she remained in occupation of the disputed parcel of land as the sole owner. She also told the trial Tribunal that the respondent, HADIJA HAMIS KISOZI and ASHA HAMIS KISOZI are blood sisters. It was her evidence that, on the material date the respondent was accompanied by her sister ASHA. She however vehemently denied the fact that, she trespassed over the respondent's suit land, as she believed that, she and her Late husband did purchase the suit land from ASHA HAMIS KISOZI.

Based on the above factual background of the matter, the trial Tribunal believed the respondent's version and decided in her favour as hinted above. Aggrieved, the appellant lodged the instant appeal on six grounds of complaints seeking to assail the decision of the trial Tribunal as hereunder: -

1. That, the District Land and Housing Tribunal erred in law and facts by entertaining the matter without joinder of the necessary party which rendered the proceedings to be fatal;
2. That, the District Land and Housing Tribunal erred in law and fact by not considering that some of the documents tendered as exhibits before it was forged;
3. That, the District Land and Housing Tribunal erred in law and fact by not considering that when the land in dispute was sold to the appellant there was erected building on the plot;
4. That, the District Land and Housing Tribunal misdirected itself when it failed to properly record and evaluate the evidence adduced before it;
5. That, the District Land and Housing Tribunal's decision is against the weight of evidence on record; and
6. That, there are serious irregularities on trial proceedings.

When the appeal was placed for hearing before me on 14th June, 2023, the appellant appeared in person, and unrepresented whereas the respondent appeared in person and enjoyed the services of Mr. Jovith Lugoshola Byarugaba, learned Counsel from UBJ Attorneys based in Morogoro Region. With the parties' consensus, the appeal was disposed of by way of written submissions and both parties adhered to the Court's scheduled order. Mr. Niragira, T.E, learned Counsel drew and filed the appellant's written submission whilst Mr. Jovith Lugoshola Byarugaba, also learned Counsel drew and filed the respondent's written submission.

Both parties submitted at lengthy in support for and against the appeal. At this juncture, I would like to commend both Counsels for the parties for their

comprehensive and well researched submissions for and against the instant appeal which have assisted the Court to reach to what I believe to be a fair and just verdict.

To kick the ball rolling, Mr. Niragira, Counsel for the appellant proposed to submit and argue the first, second and third grounds of appeal separately, the fourth and fifth grounds conjointly and the sixth ground separately. Starting with the first ground, which states that, the District Land and Housing Tribunal erred in law and in facts by entertaining the matter without joinder of the necessary party, the omission which rendered the proceedings to be fatal, the Counsel submitted that it was very crucial for ASHA HAMIS KISOZI and SHADRACK SAMWEL NKWABI to be joined as parties to the case at trial for a reason that ASHA HAMIS KISOZI is the one who sold the land in dispute to the appellant's husband, SHADRACK SAMWEL NKWABI who was not a part to the case. He said, failure to join the vendor and purchaser of the disputed parcel of land as necessary parties, means that the whole proceedings is fatal. The Counsel referred this Court to the impugned judgment of the trial Tribunal at page 4 which states that; I quote:

> *"...Asha Hamis Kisozi (SU-4) muuzaji alieleza kuwa yeye aliuza eneo kwa Shadrack Nkwabi mwaka 2009...".*

To buttress his contention, Mr. Niragira cited the case of **Juma B. Kadala vs. Laurent Mkande, (1983) TLR 103,** where the Court held; in a suit for recovery of land sold to a third party, the buyer should be joined with the seller as a necessary party defendant. Non-joinder will be fatal to the proceedings. He added that, in this appeal, it is not just a matter of joining a party as a necessary party but the crucial issue is non-joinder of a necessary party. He further cited the case of **Godfrey**

Kuzugula vs. Abdulrahim Peter Shangashi (Misc. Land Appeal 120 of 2019) [2020] TZHCD 2302 (2 October 2020), where this Court (Hon. I. Maige, J., As he then was) observed that: -

> *"...where the non - joinder is of a necessary, the position of law is such that the judgment and proceeding thereof become null and void. The rationale being that in the absence of a necessary party in the proceedings, no decree capable of being executed can be issued...".*

Corresponding observation was made in the case of **Juliana Francis Nkwabi vs Lawrent Chimwaga (Civil Appeal 531 of 2020) [2021] TZCA 645 (4 November 2021),** where the Court of Appeal of Tanzania (the CAT) held:

> *"...Flowing from foregoing discussion, it is our considered view that, upon making a determination that, a necessary party was not joined in the suit, the learned High Court Judge was required to refer back the matter to the trial court with a direction that a necessary party be joined and the suit proceed from there, we are fortified in this view by our decision in Farida Mbaraka and Farid Ahmed Mbaraka v. Domina Kagaruki, Civil Appeal No. 136 of 2006 (unreported) where after detecting that after the necessary party was not joined into the suit, we remitted the matter to the trial Court with directions that hearing should proceed after joining*

a necessary party...".

Connecting the decision of the CAT cited hereinabove with the matter under consideration, Mr. Niragira argues that the finding of the Apex Court is akin to the facts of the instant appeal in that, the trial Chairperson erred in law upon determining the dispute without joining the necessary party. He stated that, the trial Chairperson had all powers to struck out the Application and direct the parties to join the necessary party / parties to this case as suggested so as to avoid multiplicity of the cases. The Counsel also cited the case of **Christina Jalison Mwamlima and Another vs. Henry Jalison Mwamlima and Six Others,** Land Case No. 19 of 2017 to fortify his contention.

To conclude, Mr. Niragira submitted that, since the whole proceedings is fatal for non-joinder of the necessary parties, the Court has no option other than to dismiss this first ground and allow the appeal meanwhile remitting the case file to trial Tribunal with the directive that the necessary party / parties be joined and form part of the instant proceedings.

As regards to the second ground, the Counsel averred that, the appellant's complaint is that, the District Land and Housing Tribunal erred in law and fact by not considering that some of the document tendered as exhibit before it was forged. On this ground, Mr. Niragira accentuated that, when AW-1 was cross-examined, the Counsel for the appellant questioned the authenticity of the so-called Sales Agreement tendered before the trial Tribunal as the same read 196 indicating the year the respondent bought the land in dispute. However, during trial AW-1 changed his story from 196 to 1969. This is against Regulation 10 (3) of the District Land and

Housing Tribunal Regulations, 2003 GN. No. 402 of 29 October, 2010 which read:

> *"(3) Kabla ya kupokea walaka wowote chini ya kanuni ndogo*
>
> *(2), Baraza;*
>
> *(a) litahakikisha kwamba nakala ya waraka imepelekwa kwa mhusika mwingine katika shauri; na*
>
> *(b)* ***litazingatia usahihi wa waraka".***

On the third ground, the appellant's complaint is that, the District Land and Housing Tribunal erred in law and fact when it failed to consider the fact that, when the land in dispute was sold to the appellant, already a building had been erected within the said plot. It was Mr. Niragira's contention that, the respondent told the trial Tribunal that since 1969 when she bought the land in dispute up to 2016, which is more than 47 years, she had never made any improvements or developments on the suit land but SU-4 (ASHA HAMIS KISOZI) testified that, she sold the area measured 20 by 40 to SHADRACK NKWABI in 2009 with a building thereon. He said, it is on record that, during the trial the respondent was recorded to have stated that: *"...eneo langu sijaendeleza tangu 1969....."* but the testimony tendered by SU-4 shows that, *niliuza nyumba yangu kwa SHADRACK NKWABI mwaka 2009 ila nilijenga mwaka 2009.* It was his argument that, based on these pieces of evidence, the crucial question to be asked is this; by the time SU-4 erected her building on the disputed land in 2003, what was the respondent's whereabout? Taking into account that, the sale agreement tendered as Exhibit D1 expressly states that; *"....Leo hii tarehe 06/10/2009 nimenunua kiwanja changu chenye ukumbwa wa 20 kwa 40 ndani yake kuna jengo....".*

On the fourth and fifth grounds, the appellant's grievances are that the District Land and Housing Tribunal misdirected itself when it failed to properly record and evaluated the evidence adduced before it and that its decision is against the weight of evidence on records. To substantiate these two grounds, Mr. Niragira highlighted that, the trial Tribunal did not consider and evaluate all the evidence adduced at trial henceforth came up with a wrong decision based on the respondent's vague and contradictory evidence. It was the Counsel's argument that, during the trial the respondent (AW-1) testified that the measurements of the land in dispute is 30 by 13 paces, while at paragraph 3 of the Application No. 146 of 2020 which is the subject of this appeal, she alleged that the land in dispute is measured 86 X 55 and 18 X 35. In his opinion, these are two different statements from the same person. He said, in the circumstance, it was too difficult for the trial Tribunal to choose which statement was true and safely to rely on. He stressed that, such contradiction on the sizes of the land in dispute leave a hole to the case filed by the respondent / applicant. To reinforce his argument, Mr. Niragira cited the decision of this Court (Ngigwana, J.) in the case of **Hassan Naziru Vs. Peradius Perintun,** (PC) Criminal Appeal No. 26 of 2020 (unreported).

He highlighted that, the consequences of having such inconsistencies and contradiction in the testimony adduced by the respondent in respect of the size of the land in dispute must be resolved in favour of the appellant, citing the case of **Jeremiah Shemweta vs. Republic 1981 (TLR) 228** to bolster his argument.

Regarding the analysis done by the trial Tribunal, the Counsel submitted that the same is full of doubt because it neither made a thorough scrutiny nor considered the evidence adduced by the appellant, and the worse thing is that what was

recorded by the trial Tribunal was different to what the appellant testified before it. Giving an example, Mr. Niragira stated that, during the trial SU-4 (ASHA HAMIS KISOZISU) loudly shouted that the document tendered at trial as Sale Agreement by the respondent herein (AW-1) was forged, and this piece of evidence was not recorded. He cited the case of **Hussein Idd & Another Vs. R, (1986) TLR 166,** wherein it was held that, it was a serious misdirection on the part of the trial judge to deal with the prosecution evidence on its own and arrive at the conclusion. He insisted that since the trial Tribunal completely disregarded the evidence tendered by the respondent herein/appellant and her witnesses and failed to evaluate the evidence in the judgment, this means that the trial Tribunal seriously mislead itself.

This being the first appellate Court, Mr. Niragira urged the Court to apply the principles enunciated in the cases of **Ndizu Ngasa vs. Masisa Magasha (1999) TLR 202** and **R. Vs. Mahuzi Zaidi (1960) HCD** at page 249. In the latter case, the Court observed that:

> *"As in all appeals, it is the duty of the Court to weigh the evidence and draw its own conclusions. Where it is clear that the trial judge has plainly gone wrong and failed to appreciate the weight or bearing of circumstances admitted or proved the appellate Court should not hesitate to interfere".*

On Sixth ground, it is the appellant's complaint that, there are serious irregularities on the proceedings of the trial Tribunal. To elaborate the point, Mr. Niragira averred that the respondent had no legal basis (locus standi) to sue or be

sued in her names in connection with the land in dispute for a reason that at that time she was not an administratrix of the Estate of the Late SHADRACK SAMWEL NKWABI. He said, at page 6; paragraph 2 of the impugned judgment, the trial Tribunal observed that: *"...Mjibu maombi alijichanganya zaidi alipoeleza kuwa yeye ni msimamizi wa mirathi ya mume wake, lakini hakuteuliwa na Mahakama".* Again, on 14/11/2022 when the appellant testified before the trial Tribunal, she was recorded to have stated that: *"...Tulinunua kiwanja chenye jengo mimi na marehemu mume wangu tarehe 06/10/2009....".*

Further, during cross-examination the respondent testified that; *".....Mume wa Flora namfahamu lakini amefariki...."* In his opinion, since there is some interest pertaining to the deceased, SHADRACK SAMWEL NKWABI and the respondent is aware of it, no doubt that the proper party to be sued was Flora's husband. He said, this legal position of the law regarding *locus standi* was underscored by this Court (Justice BA. Samatta, JK, (As he then was) in the cases of **Petro Zabron Sinda & Another Vs. Zabron Mwita,** Civil Case No. 176 of 2017 and **Lujuna Shubi Balonzi Vs. Registered Trustees of Chama Cha Mapinduzi (1996) TLR 203.** In the latter case of **Lujuna Shubi Balonzi** (supra) the Court held that:

> *"According to law, in order to maintain proceedings successfully, a plaintiff or an applicant must show not only that the Court has power to determine the issue but also that he is entitled to bring the matter before the Court...".*

In view of the above submission, Mr. Niragira averred that, it was irregular for the appellant to prosecute the case without having *locus standi* and the trial Tribunal to decide in favour of the respondent to avoid multiplicity of dispute over the same

property. He said, since the record indicates that there is nowhere the appellant bought the land in dispute from the ASHA HAMIS KISOZI, it means the whole proceedings were tainted with irregularities. Moreover, Mr. Niragira referred this Court to the provision of section 100 of the Probate and Administration of Estates Act, [CAP. 352 R.E. 2019] and stated that, it is a trite law that, an executor or administrator has the same power to sue in respect of all causes of action that survive the deceased, and may exercise the same power for the recovery of debts due to him at the time of death, as the deceased had when living, citing the case of **Omary Bakari vs. Zalika Mwalimu (Misc. Land Appeal 35 of 2021) [2022] TZHCD 113 (7 March 2022)** to fortify his argument.

He averred that, in the matter under consideration, the appellant had no legal capacity to be sued and prosecute the land dispute before the trial Tribunal since the law directs her or any person interested, to obtain first legal capacity upon applying before the Court with competent jurisdiction to be the administrator/ administratrix of the Estates of the Late SHADRACK SAMWEL NKWABI. He therefore, prayed the Court to allow this appeal with costs.

Responding to the first ground of appeal, Mr. Byarugaba, Counsel for the respondent submitted that, the contention by the Counsel for appellant that in absence of ASHA HAMIS KISOZI and SHADRACK SAMWEL NKWABI as necessary parties to the matter at hand vitiates the decision of the trial Tribunal is not true and the argument is misplaced because they were not in occupation of the land in dispute. He said, not every party is a necessary party to a suit. It is settled that, not in every case a buyer and seller shall be necessary parties as each case must be determined in accordance with its peculiar facts and circumstances. He contended

that, the term necessary party is defined to mean, "one whose presence is indispensable to the constitution of the suit, against whom the relief is sought and without whom no effective order can be passed by. See: C.K. TAKWAN in his book titled CIVIL PROCEDURE WITH LIMITANTION ACT, (1963), 7th Edition Published by Eastern Book Company Lucknow at page 162.

He highlighted that, the crucial factors to be considered to determine whether a person is a necessary party or not, the CAT in the case of **Abdulatif Mohamed Hamis vs Mehboob Yusuf Othman & Another (Civil Revision 6 of 2017) [2018] TZCA 25 (24 July 2018)** clearly set the principles in motion. In this case the CAT held:

> *"The determination as to who is a necessary party to a suit would vary from a case to case depending upon the facts and circumstances of each particular case. Among the relevant factors for such determination including the particulars of the non-joined party, the nature of relief claimed as well as whether or not in the absence of the party, an executable decree may be passed.*

He said, the above established principle was followed by this Court in its recent decision in the case of **Alex Saba vs. Joyce Sewando (Land Appeal no. 20 of 2022) [2023] TZHC 18092 (26 May 2023) HCT at Morogoro (2022)** (unreported).

Based on the above authorities, it was Mr. Byarugaba's contention that, ASHA HAMIS KISOZI and SHADRACK SAMWEL NKWABI were not necessary parties as the respondent had no cause of action against them. However, the respondent herein

had a cause of action against the appellant (FLORA IDD) who alleged to be a lawful owner of the land in dispute. Hence the first ground of appeal is devoid of merit.

Responding on the second ground, Mr. Byarugaba avowed that this ground is also misplaced. He argues that, it is settled principle of law that parties are bound by their own pleadings. It is evident on record that, the respondent / applicant did not raise any issue of forgery before the trial Tribunal in respect of the Sale Agreement tendered by the respondent at trial. Referring to paragraphs 1 to 10 of the appellant's /respondent's Written Statement of Defense (the WSD) filed before the trial Tribunal, Mr. Byarugaba accentuated that there is nowhere indicated that such a document was a forged one. Absence of such a fact in parties' pleadings bar or restricts the appellant to raise the same at this first appellate stage. He invited this Court to be guided by a recent decision of the CAT in the case of **Eupharacie Mathew Rimisho t/a Emari Provision Store & Another vs Tema Enterprises Limited & Another (Civil Appeal No. 270 of 2018) [2023] TZCA 102 (13 March 2023),** wherein the Court at page 21 of the typed copy of judgment had the following to state:

> *"It is settled law that the parties are bound by the pleadings, in the matter under scrutiny, the issue of forgery which cropped up at the trial is not rooted in the pleadings and it ought to have been disregarded by the trial court, without prejudice to the aforesaid, even if the signature were forged as alleged". it was incumbent on the appellants to act promptly, invoke other remedies by reporting the matter to the police because all long, and*

before filing the joint written statement of defence the appellants had knowledge on the existence of exhibit P2 which was Annexed to the Plaint, in the circumstances, the Appellants inaction to invoke remedies under criminal justice leaves a lot to be desired as correctly found by the Learned trial Judge.

On the basis of the above cited precedent, the Counsel underlined that, since the issue of forged exhibit is not rooted from the appellant's pleadings, the same cannot stand at this stage of appeal. Considering the fact that, the appellant before filing her WSD was aware of the said Sale Agreement as the same it was attached along with the Application and yet couldn't take any legal remedy under the auspices of criminal justice system, in the circumstances, this is an afterthought and leaves a lot to be desired. He prayed the Court to dismiss this second appeal for lacking merit.

On the third ground, it was Mr. Byarugaba's argument that, on this ground, the appellant's Counsel did intent to mislead the Court of law because the respondent through her own documentary and oral evidences proved that she was the lawful owner of the land in dispute. He said, when ASHA HAMIS KISOZI, the seller and defence witness no.4 (SU-4) was cross-examined, she testified that she inherited the land in dispute from her late father but she had neither a will nor letters of administration through which she might have been bequeathed. In absence of such vital evidence her transaction for sale of land remains inoperative.

It follows therefore that, ASHA HAMIS KISOZI (the seller) had no title to pass to the appellant. He said, to resolve the parties' controversy, the Court should

borrow a leaf and get inspiration from the decision of the CAT in **Pascal Maganga vs. Kitinga Mbarika,** Civil Appeal No. 240 of 2017, CAT AT MWANZA, (2019) (unreported), at page 8 where it was held:

> *"Patrick Aman Mbarika, without a proper will giving him ownership of the disputed house, had nothing to pass to the appellant. That is to say, no good title passed from him, the seller to the appellant; the buyer had nothing to sell, or exchange as happened here to the appellant".*

He submitted that; this stance find support in the rule embodied in the Latin maxim which goes; '*Nemo dat quod non habet"* which means - no one gives a better title to property than he himself possesses. See - Black Law Dictionary (8th Edition). He was of the firm view that, the appellant had never bought land and the same land was proved to be owned by the respondent and no one else. Again, he prayed the Court to dismiss this ground for lacking merits.

As regards to the fourth and fifth grounds, Mr. Byarugaba averred that the appellant's submissions on these two grounds are misleading. He said, it is settled law that the standard of proof in civil matters is on the balance of probability. The standard of proof applicable in criminal cases as it was expounded in the case of **Jeremiah Shemweta vs. Republic** (supra) does not and has never been applicable in civil cases. He submitted that, since the evidence tendered by the appellant failed to meet the required standard, it was a weak type of evidence as compared to the evidence adduced by the respondent who was able to establish her basis of ownership of the land in dispute, that is why the trial Tribunal properly

applied the principle established in the case of **Hemedi Said vs. Mohamed Mbilu [1984] TLR 113** and ruled in her favour.

He vehemently protested the allegation by the Counsel for the appellant that, the trial Tribunal failed to record the appellant's testimony and submitted that such an allegation is purely an impeachment of the Court record and should not be entertained by the Court. He cited the case of **Halfani Sudi vs Abieza Chichili (Civil Reference 11 of 1996) [1998] TZCA 7 (9 April 1998)** at pages 3 and 4 where it was held that: A court record is a serious document. It should not be lightly impeached'....and that there is always a presumption that a court record accurately represents what happened. He was of the firm view that, the evidence tendered by both parties was properly recorded, evaluated and accorded its weight.

In view of the above discussion, Mr. Byarugaba underlined that the fourth and fifth grounds of appeal do not hold water and deserves to be dismissed.

On Sixth ground of appeal, the appellant has raised the issue of capacity to sue or to be sued. Mr. Byarugaba informed this Court that, looking at this ground of appeal, it is not rooted from the parties' pleadings. He said in the WSD filed by the appellant / respondent at trial, she only insisted that she was the lawful owner of the disputed parcel of land, and nowhere she claimed to have lacking *locus standi.* He insisted that, matters not rooted in the pleadings should not be entertained on appeal. He asserted that, since the parties are bound by their own pleadings, he urged the Court to rely on the decision of the CAT in the case of **Eupharacie Mathew Rimisho t/a Emari Provision Store & Another vs Tema Enterprises Limited & Another (supra)** to determine this ground of appeal.

Based on the above submission, the Counsel avowed that, since the appellant alleged to be the owner and the one who possessed the land in dispute, then she was rightly sued by the respondent, hence this sixth ground crumbles.

He concluded that, based on the foregoing arguments, submission and on the strength of the authorities cited hereinabove, this appeal is without merits. He therefore, prayed the Court to sustain the judgement and decree of the trial Tribunal and dismiss the appellant's appeal with costs.

Having summarized the parties' submissions and dispassionately considered the rival arguments advanced by the Counsels from both sides, I find that the issue calling for determination, consideration and decision thereon is, whether this appeal has merits or otherwise. But before I dwell on the grounds of appeals and submissions advanced by the parties for and against the instant appeal, I am mindful that this being a first Appellate Court, I am duty bound to re-evaluate the entire evidences on record and come up with my own decision. See - **Siza Patrice Vs. Republic,** Criminal Appeal No. 19 of 2010, CAT sitting at Mwanza (unreported) and **Fred Samwel @ Kindumba vs Republic (Criminal Appeal 68 of 2021) [2022] TZHC 10781 (26 July 2022)** (extracted from www.tanzlii.go.tz). For instance, in **Siza Patrice Vs. Republic** (supra), the Court observed that: -

> *"We understand that it is settled law that a first appeal is in the form of a rehearing. As such, the first appellate court has a duty to re-evaluate the entire evidence in an objective manner and arrive at its own finding off act, if necessary".*

In the case of **Fred Samwel @ Kindumba vs Republic (supra)** this Court had the following say:

> *"This court being the first appellate court, I am in the position of re-evaluating the evidence of the trial court and make my own determination of the same".*

Secondly; it is a settled law that, Court records is a serious document and it is presumed that, Court records accurately represents the truth of what actually happened or transpired at trial. Hence, it should not be lightly impeached. In the case of **Halfan Sudi Vs. Abieza Chichili [1998] TLR 527,** the CAT held:

> *"We entirely agree with our learned brother, MNZAVAS, JA, and the authorities he relied on which are loud and clear that; "A Court record is a serious document. It should not be lightly impeached. There is always the presumption that a court record accurately represents what happened."*

I have indicated hereinabove that, the Counsels for the parties forcefully submitted at lengthy for and against the present appeal. At this juncture, I find it pertinent to remind parties to this case, their learned Counsels and legal fraternity as a whole that submissions are generally meant to reflect the general features of a party's case. They are elaborations or explanations on evidence already tendered. They are expected to contain arguments on the applicable law. They are not intended to be a substitute for evidence. **[See: The registered Trustees of Archdiocese of Dar Es Salaam vs. The Chairman Bunju Village & 11 Others,**

Civil Appeal No. 147 of 2006, CAT at DSM and **Trade Union Congress of Tanzania (TUKTA) vs Engineering Systems Consultants Ltd & Others (Civil Appeal 51 of 2016) [2020] TZCA 251 (26 May 2020)].**

Having revisited the principles of law, which I believe will guide me to land safely to the final verdict of this appeal, I propose to commence my determination of the instant appeal on the fourth and fifth grounds of appeal. These grounds were conjointly argued by both sides. The appellant's main complaints on these two grounds, is failure by the trial Tribunal to properly record and evaluate the evidence adduced before it. Whereas, the Counsel for the appellant submitted that the respondent did not prove her case on the required standard of proof, on the other hand, the Counsel for the respondent had different view as he held a position that the decision reached by the trial Tribunal was sound and prayed the Court to sustain the impugned Judgment, Decree and any Orders stems from such proceedings for a reasons that, the trial Chairperson properly recorded and evaluated the evidences adduced by both parties during the hearing of the case.

I have carefully read and scrutinized the proceedings of the trial Tribunal and the impugned judgment in line with the contending arguments. At the outset, I partly agree and partly disagree with the Counsels for the parties that the cases cited by Mr. Niragira, Counsel for the appellant including the cases of **Hassan Naziru vs. Peradius Perintun; Jeremiah Shemweta vs. Republic; Republic vs. Mahuzi Zaidi; Mzee Ally Mwinyimkuu @ Babu Seya vs. Republic (supra)** and **Leonard Mwanashoka vs. Republic,** (supra) and heavily relied upon by him are not suitable in this case. On this facet, I agree with Mr. Byarugaba's submission that, all criminal cases referred to this Court by Mr. Niragira intending to

demonstrates that the standard of proof and weight of evidences taken and recorded by the trial Tribunal do not support his submission because the nature of the matter at hand is civil case. In criminal cases, the standard of proof is beyond reasonable doubt, while in Land matters and all civil cases the standard of proof is based on preponderance of balance of probabilities. Therefore, looking at the standards of proof in both criminal and civil matters, any inconsistences or discrepancies in respect of the evidences in criminal cases cannot be weighted and compared on the same scale of balance with that found in civil cases. As correctly submitted by Mr. Byarugaba, the well cherished principle of standard of proof in civil cases is on balance of probability. See - **Hemedi Said vs. Mohamed Mbilu, [1984] TLR 113** (supra).

Apart from the foregoing however, that alone cannot suffice to conclude and adjudge that, the fourth and fifth grounds of appeal forcefully elaborated by the Counsel for the appellant through written submission are devoid of merit. I say so because, Mr. Niragira accentuated that, the respondent's testimony regarding the size(s) of the land in dispute and what it was stated in Application No. 146 of 2020 filed by the respondent are inconsistent. He contended that, looking at the proceedings of the trial Tribunal, the respondent (HADIJA HAMIS KISOZI) who testified as AW-1, told the trial Tribunal that the land in dispute was (is) measuring 30 by 13 paces while at paragraph 3 of her Application No. 146 of 2020 the land in dispute was described as measuring (86 x 55 on one side and 18 x 35 on the other side). However, Mr. Byarugaba, Counsel for the respondent did not comment anything on this piece of evidence.

On reviewing the record of the trial Tribunal, I found the records speaks loudly as hereunder:

> ***"21/03/2022***
>
> *Akidi: M. Khasim - Mwenyekiti.*
>
> *Wajumbe: (1) Mr. Mpesa.*
>
> *(2). Mrs. Nsana.*
>
> ***Mwombaji:*** *Wakili Jovith Byarugaba kwa ajili ya Mdai - Yupo;*
>
> ***M/Maombi:*** *Wakili Kelvin Kachinga kwa ajili ya mdaiwa- Y upo;*
>
> ***Wakili Jovith Byarugaba****: Shauri lilipangwa kusikilizwa ninashahidi mmoja leo.*
>
> ***Wakili Kelvin Kachinga:*** *Niko tayari pia.*
>
> ***VIINI VILIVYOAINISHWA:***
>
> 1. ***Kama mdai ni mmiliki halali wa ardhi yenye mgogoro yenye ukubwa wa 86 x 55 na 18 x 35 iliyopo mtaa wa Changarawe Kata ya Mzumbe.***
> 2. *Endapo mdaiwa amevamia eneo hilo mwaka 2016 na kuanza kuliendeleza. Nafuu ambazo baraza hili litaona zinastahili kutolewa [Emphasis Added].*
>
> ***Sahihi:***
>
> ***21/03/2022".***
>
> *[Bold is mine].*

As transpired from the proceedings of the trial Tribunal, on the same day, the respondent, HADIJA HAMIS KISOZI who featured as AW-1, gave her testimony and among others, she testified on the size(s) of the disputed land. Her testimony is as follows:

> *".....Namiliki kiwanja, awali palikuwa panaitwa Mongole, sasa hivi panaitwa Changarawe. Nilinunua eneo lenye ukubwa wa hekari moja tarehe 14/10/1969 kutoka kwa*

Kaloli Kinanga. Baada ya kununua eneo nilimkatia mtu anaitwa Pauline Shabani. ***Eneo lenye mgogoro lina ukubwa wa hatua za miguu 30 kwa 13".***

[Bold is mine].

Again, my close scrutiny on proceedings taken and recorded by the trial Tribunal reveals further that, even AW-2 (FERDINAND STANSLAUS MATANGALU), a witness called by the AW-1 to appear before the Tribunal with a view to support her testimony, told the trial Tribunal a different story in respect of the size(s) of the disputed land. This means that, the evidence adduced by AW-1 and AW-2 concerning the size(s) of the land in dispute do not tally. For ease of reference, the evidence of AW-2 (FERDINAND STANSLAUS MATANGALU) transpires as follows:

"14/11/2022

".....Mimi ninachofahamu kwa wakati huo kabla Flora hajaanza kulitumia. Mwenyewe namjua ni Hadija Hamis Kisozi. Baadae niligundua kuna mgogoro baada ya Hadija kufika ofisini na kudai eneo lake limeyamiwa. ***Eneo lenye mgogoro lina kama hatua kumi na tatu (13) kutoka mashariki kwenda barabara ya Mlali na Kaskazini kwenda Kusini kama hatua ishirini (20)....."***.

[Bold is mine].

The third witness called by the respondent herein was GERALD GERVAS NGONYANI (AW-3). Apart from examination in chief, during cross-examination, in

particular on aspect of the size(s) of the land in dispute, AW-3 told the trial Tribunal that: -

> ***".....Eneo lenye mgogoro lina upana wa miguu kumi na tatu (13) au kumi na tano (15), urefu miguu ishirini (20) au ishirini na mbili (22)....".***
>
> *[Emphasis Added].*

As I have stated earlier on, whereas the Counsel for the appellant insisted that the trial Tribunal misdirected itself upon failing to record properly and evaluate the evidence adduced by the parties, hence its decision is against the weight of evidence on records, to his part, Mr. Byarugaba, Counsel for the respondent stressed that the evidences tendered at trial were properly recorded, evaluated and accorded its weight respectively. To resolve the controversy, I spent time to read and scrutinize the entire evidences as taken and recorded by the trial Chairperson. On this aspect, I am partly in agreement with the submission made by Mr. Byarugaba, Counsel for the respondent that, the trial Tribunal correctly recorded the evidences adduced by the parties herein and their respective witnesses. However, I tend to disagree with him as to whether the trial Chairperson performed his duty accurately to assess the evidence before him. In particular, my point of departure is on the point of failure by the Chairperson to properly evaluate the evidences on record and accord its weight.

On reviewing the evidence on record and closely studied both the impugned judgment and the decree, I noticed that the same are silent and indeed does not indicate or even elaborate and assign good reasons as to why the evidences concerning the size(s) of the land in dispute, as shown above, was (were) not taken into consideration during composition of the judgment and making analysis of the

evidences tendered by the witnesses. I have clearly demonstrated hereinabove by quoting part of the excerpts from the testimonies given by AW-1, AW-2 and AW-3 respectively. It is on record that, on the side of the respondent / applicant at trial, the following pieces of evidence were tendered before the trial Tribunal in a bid to convince it, to believe their testimonies. For instance, AW-1 (HADIJA HAMIS KISOZI) stated that, the land in dispute was (is) measuring 30 lengths-paces and 13 widths-paces; AW-2 (FERDINAND STANSLAUS MATANGALU) narrated, the land in dispute was (is) measuring 20 length-paces and 13 width-paces and the evidence of AW-3 (GERALD GERVAS NGONYANI) shows that, the land in dispute is 20 - 22 length-paces and 13 - 15 width-paces. As I have said, these pieces of evidences were not recorded in the impugned judgment and the Hon. trial Chairperson did not take trouble to consider such pieces of evidences and analyze in accordance with the facts of the case, evidences adduced in support thereof and the applicable law.

It is on record that, throughout the entire evidences adduced by the respondent's side before the trial Tribunal, nowhere the respondent AW-1 (HADIJA HAMIS KISOZI), AW-2 (FERDINAND STANSLAUS MATANGALU) or even AW-3 (GERALD GERVAS NGONYANI) testified that, the land in dispute was (is) measuring 86 x 55 on one side and 18 x 35 on the other side. As rightly submitted by the Counsel for the respondent, parties are bound by their own pleadings. It is very important to note that at paragraph 3 of the Application filed by the respondent before the trial Tribunal, the sizes of the parcel of land in dispute was clearly described, but there is no supporting evidence to justify her allegation. This is against the guiding principles of law as enshrined under sections 110, 111 and 112 of the Evidence Act [CAP. 6 R.E. 2022].

With these pieces of evidence, it is astonishing to this Court to find that the Hon. trial Chairperson, for reasons better known by himself and without making an appropriate evaluation, assessment and analysis of the evidence before him and accorded its weight, at the end of the day declared the respondent as the lawful owner of the disputed parcel of land. For better understanding and clarity, I find it pertinent to highlight, albeit briefly, the analysis made by the Hon. trial Chairperson at page 8 of the impugned judgment. The Hon. Chairperson had the following to state: -

> *"....Baraza hili linatamka hapa kwamba **mwombaji ni mmiliki halali wa ardhi bishaniwa,** iliyopo Mtaa wa Changarawe, Kata ya Mzumbe Wilaya ya Mvomero, **yenye vipimo vya (86 x 55 upande mmoja na 18 x 35),** ambayo imezungukwa na; Magharibi - Paulina Shabani, Mashariki - Mwenda Mwenda Mdeng'o, Kaskazini – Mlali / Mgeta Road na Kusini - Martin Mtindo. Mjibu maombi ni mvamizi katika ardhi bishaniwa.....".*
>
> *[Bold is mine].*

On the other hand, the decree prepared by the Hon. Chairperson and later issued to the parties herein dated on 2nd day of December, 2022, decreed as follows:

"TUZO

BARAZA HILI LINATOA AMRI HAPA KWAMBA:

1. *Mwombaji ni mmiliki halali wa ardhi bishaniwa, iliyopo Mtaa wa Changarawe, kata ya Mzumbe Wilaya ya Mvomero, **yenye vipimo vya (86 x 55 upande***

mmoja na 18 x 35), *ambayo imezungukwa na; Magharibi - Paulina Shabani, Mashariki - Mwenda Mwenda Mdeng'o, Kaskazini - Mlali/Mgeta Road na Kusini - Martin Mtindo".*

02/12/2022

Sigd. by:

R.W. MMBANDO

MWENYEKITI"

[Bold is mine].

As shown above, both the judgment and decree did not confine within the evidences adduced before the Tribunal. In my view, the Hon. Chairperson decided the matter perhaps outside the evidences adduced before him. By way of emphasize and to make the principle clearer and more universal, whoever sits to dispense justice, must dispense justice timely and impartial in accordance to the available evidences received from both parties. Magistrates and Judges or other persons with the authority to dispense justice, their hands are tightened outside the available evidences of the parties given under oath of affirmation. My brethren (Hon. Ngwembe, J., As he then was) in **Hasani Said Chonga vs Yasini Mohamedi Mnengelea (Application for Labour Revision 5 of 2016) [2020] TZHC 2094 (30 June 2020)**, (extracted from www.tanzlii.go.tz) observed that: -

> *"Undoubtedly, court judgement or tribunal's decision, must strictly base on the evidence recorded during trial and not on outside evidences, however acquired. Always*

judgement should not go outside the record and base his findings on matters within his personal knowledge".

Looking at the proceedings of the trial Tribunal and its decision, I agree and convinced as well by the submission made by the Counsel for the appellant that, the trial Tribunal truly failed to evaluate the evaluate the evidences adduced by the parties before him, hence wrongly decided in favour of the respondent as the evidences given by the respondent did not support her assertion.

Since it is evident from the record that, the Hon. Trial Chairperson dealt with the matter subject to this appeal and accordingly made his analysis and finally composed the judgment and delivered on the 2nd day of December, 2022 but outside the scope of the available evidences on record, such an act, it is as if, the impugned judgment was crafted outside the Tribunal's jurisdiction. It is a settled principle of law that, a judgment must convey some indication that the Judge, Magistrate or Tribunal Chairperson has applied his or her mind to the evidence on records. This position of the law was underscored by the Apex Court of the Land in **Hamis Rajabu Dibagula vs. R, [2004] TLR. 196,** where the CAT held: -

"A judgement must convey some indication that the judge or magistrate has applied his mind to the evidence on the record. Though it may be reduced to a minimum, it must show that no material portion of the evidence laid before the court has been ignored. A good judgement is dear, systematic and straight forward. Every judgement should state the fact of the case, establishing each fact by

reference to the particular evidence by which it is supported and it should give sufficiently and plainly the reasons which justify the finding. It should state sufficiently particulars to enable a court of appeal to know what facts are found and how".

Guided by the principles of laws articulated in the above cited authorities coupled with my finding, I am in agreement with the Counsel for the appellant that, the District Land and Housing Tribunal for Morogoro, at Morogoro misdirected itself when it failed to properly assess and evaluate the evidences adduced by the parties before it, hence its decision was against the weight of evidences advanced by the parties. That being the position, the fourth and fifth grounds of appeal have merits.

Having determined the fourth and fifth grounds of appeal affirmatively, it is my findings that these two grounds of appeal suffice to dispose of the entire appeal without even considering the rest grounds of appeal. Thus, in view of what I have endeavoured to deliberate hereinabove, and upon considering the surrounding circumstances, it is my considered view that, as it was remarked by Lord Chief Justice Hewart nearly 100 years ago that; "Justice should not only be done, but should manifestly and undoubtedly be seen to be done", I think, in my view that, it would be justice and more appropriate for both sides, if I will allow the appellant's appeal and order the matter be tried de-novo by a different Chairperson with different sets of assessors.

Consequently, I hereby allow this appeal, quash the entire proceedings taken and recorded before the District Land and Housing Tribunal for Morogoro, at

Court:

Judgement delivered under my hand and Seal of this Court in Chambers this 26th day of February, 2024 in the presence of the Appellant who appeared in person and Hamisi Ally relative of the Respondent present but in absence of Respondent and her Leaned Advocate.

F.Y. MBELWA

DEPUTY REGISTRAR

26/02/2024

Court:

Rights of the parties to appeal to the Court of Appeal of Tanzania fully explained.

F.Y. MBELWA

DEPUTY REGISTRAR

26/02/2024